No. 15434

In the

United States Court of Appeals

For the Ninth Circuit

AH PAH REDWOOD CO., A California Corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioner's Showing and Brief in Opposition to Respondent's Motion for Permission to File Supplemental Brief and His Supplemental Brief

Petition to Review a Decision of the Tax Court of the United States

HONORABLE ERNEST H. VAN FOSSAN, JUDGE

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ARGUMENT

Respondent cites no authority permitting him to file a Supplemental Brief.

Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit, pertaining to Briefs, makes no mention whatever of Supplementary Briefs.

Rule 15 of said rules provides in part:

"1. All motions to the court shall be reduced to writing, shall contain a brief statement of the facts

and objects of the motion, shall be supported by points and authorities, and, where the facts are not otherwise proved in the cause, by affidavits, and shall be served upon opposing counsel at least 5 days before the day noticed for the hearing."

This Court has held that within their limited sphere, rules of Court have the force of law. *Meyer v. Territory of Hawaii* (9th Circ., 1947), 164 F2d 845.

This Court has also held that without good cause shown, the rules of Court will not be waived. See *Kennedy v. United States* (9th Circ., 1940), 115 F2d 624; *Hargraves v. Bowden* (9th Circ., 1954), 217 F2d 839; and *United States v. Gallagher et al* (9th Circ., 1945), 151 F2d 556.

Since Respondent has neither sought a waiver of the rules of this court, nor has he shown any basis for a waiver, Respondent's motion must be denied.

Without waiving its objection to Respondent's motion for permission to file a Supplementary Brief, Petitioner feels compelled to correct certain misstatements contained in Respondent's Supplementary Brief.

Respondent contends that Petitioner has altered the position adopted by it in its opening Brief, by contending in its Reply Brief that the contract referred to in the Stipulation of Facts is void for want of mutuality.

In fact, this contention was made by Petitioner in the Briefs which were filed in the Tax Court. No matter of surprise is involved in any way.

On June 28, 1955, Petitioner filed in the Tax Court its Brief which contained the following language (at page 7):

> "B. *The agreement was not a contract to sell timber. It was no more than a license to cut which ripened into a contract for the sale of logs upon severance of each tree. This cannot constitute a 'disposal' of timber under Section 117 (k) (2).*
>
> "In *Springfield Plywood Corp. v. Commissioner* 15 TC 697 (1950) the taxpayer purchased timber in January, 1943, and entered into a written cutting contract in May, 1943, which was held to constitute a 'disposal' of the timber on that date.
>
> "The decision turned on the court's finding that:
>
> > " '*In our view the timber involved was all sold on May 14, 1943*, and only payment, as agreed, was delayed.' (Emphasis supplied)
>
> "The Court cannot find in the present case that the timber was 'disposed of' in October, 1947, or at any time prior to 1950 when the written contract was executed by the petitioner and Coast (Ex. 2-B). Contrary to the facts in the *Springfield* case:
>
> "a.) *The agreement did not obligate Coast to pay for timber which it did not remove.*
>
> "b.) Petitioner bore the fire risk throughout 1948 and 1949.
>
> "c.) *Petitioner sold 33,883,000 board feet to A. K. Wilson Lumber Company in 1950* (Stip. 8).

"d.) The Agreement was unenforceable under the Statute of Frauds.

"It has never been held that a revocable cutting license which passes no interest in the timber to the licensee constitutes a 'disposal' of the timber within Section 117 (k) (2). Defendant erred in refusing to allow petitioner to treat income received from Coast in 1948 and 1949 as long term capital gain, since disposition of the timber factually and legally occurred more than six (6) months after its acquisition by petitioner." (Emphasis supplied)

In Petitioner's opening Brief filed in this Court the following statements appear (at pages 25, 28, and 29):

"The oral agreement here may be distinguished from the written agreement in the *Springfield Plywood Corporation* case in the following particulars:

"(a) *The agreement did not obligate Coast to pay for timber which it did not remove.*" [Emphasis supplied]

* * * * *

"Here, the oral or implied agreement contemplated only *an oral license to cut timber as desired, with Coast required to pay only for logs removed, as removed, at a fixed price* (R. 18)."

* * * * *

"A license in real property may be defined as a personal unassignable and ordinarily revocable privilege which may be created by parol to do one or more acts on the land without possessing any interest therein. A license is an authority to do a

lawful act which without it would be unlawful, and while it remains unrevoked, a license justifies the acts which it authorizes to be done. This is true even of a bare parol license given without consideration. 33 Am. Jur. 398 (Licenses § 91)."

* * * * *

"The authorities are uniform in stating that an oral license to enter, cut and remove timber, is revocable by the grantor at any time as to timber remaining uncut. Therefore, there *cannot* be a 'disposal' of the timber at the time the license is granted, insofar as 1939 IRC § 117 (k) (2) is concerned."

The above quotations clearly establish that Petitioner's argument in its Reply Brief is far from new. Petitioner has emphatically contended since the beginning of this case that the contract in question was not enforceable. Petitioner urges that its Reply Brief merely carries the position which it has steadfastly maintained to an orderly and logical conclusion.

Respondent in his Supplementary Brief repeatedly refers to the use of the word "contract" in the stipulation executed by the parties on May 10, 1955. However, Respondent then contends that this stipulation constitutes an admission that all necessary elements were present to create a legally enforceable contract. *Such is not the case.*

A contract may be enforceable or unenforceable, executory or executed, unilateral or bilateral, legal or

illegal, and may or may not satisfy the requirements of mutuality.

It should be noted that in the cases cited in Petitioner's Briefs, the term "contract" is used by the Courts in referring to oral licenses to enter and cut timber given without consideration. In Corbin on Contracts, Volume I, § 157, at page 515, there appears this statement:

> "In what purports to be a bilateral contract, one party sometimes promises to supply another, on specified terms, with all the goods or services that the other may order from time to time within a stated period. A mere statement by the other party that he assents to this, or 'accepts' it, is not a promise to order any goods or to pay anything. There is no consideration of any sort for the seller's promise; and he is not bound by it. *This remains true, even though the parties think that a contract has been made and expressly label their agreement a 'contract.'* In cases like this, there may be no good reason for implying any kind of promise by the offeree. Indeed the proposal and promise of the seller has the form of an invitation for orders; and the mode of making an operative acceptance is to send in an order for a specific amount. By such an order, if there has been no previous notice of revocation, a contract is consummated binding both parties. The standing offer is one of those that empowers the offeree to accept more than once and to create a series of separate obligations. The sending in of one order and the filling of it by the seller do not make the offer irrevocable as to additional amounts if the parties have not so agreed." [Emphasis supplied]

Respondent by his argument attempts to set up two standards of interpretation of the stipulation. Respondent claims the right to read into the stipulation terms which are no therein stated, but asserts that Petitioner will be required to accept Respondent's interpretation, and will not be permitted to adopt any of several alternative interpretations which are as logical as Respondent's.

If Respondent's argument concerning the application of the statute in question (1939 IRC § 117 (k) (2) is followed to its logical conclusion, it is apparent that Respondent contends that the statute will not apply in the case of any sale where clear title to timber passes to the purchaser, since no economic interest is retained by the seller.

Respondent evidently contends that only a "partial" disposal will qualify timber sales under this statute since a complete disposal will not permit the seller to retain the economic interest required by the statute. In effect, he would nullify the operation of the statute.

The argument made by Respondent, again reflects his failure to recognize the basic principle that the term "contract" as used in 1939 IRC § 117 (k) (2) (see Appendix, infra) includes unilateral contracts, as specifically explained in Petitioner's Reply Brief at page 8.

Respondent's argument is without foundation, since a unilateral contract for "disposal" of the timber was reached at the moment of cutting and removal, and the statutory requirements for capital gains treatment were thereupon satisfied.

Petitioner has contended from the very beginning of this case that the "oral or implied contract" between it and the Coast Redwood Co. did not constitute a "disposal" under the terms of 1939 IRC § 117 (k) (2), nor did it constitute an enforceable contract. The failure of Respondent to meet this argument in his answering Brief is not now sufficient reason to permit him to file a Supplemental Brief in derogation of the rules of this Court.

CONCLUSION

Respondent's Motion must be denied, and its Supplemental Brief should be striken from the files.

Respectfully submitted,

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APPENDIX

1939 IRC § 117 (k) (2) provides.

"Gain or loss upon the cutting of timber

"(2) In the case of the disposal of timber or coal (including lignite), held for more than 6 months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber or coal, the difference between the amount received for such timber or coal and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber or coal. Such owner shall not be entitled to the allowance for percentage depletion provided for in section 114(b) (4) with respect to such coal. This paragraph shall not apply to income realized by the owner as a co-adventurer, partner, or principal in the mining of such coal. The date of disposal of such coal shall be deemed to be the date such coal is mined. In determining the gross income, the adjusted gross income, or the net income of the lessee, the deductions allowable with respect to rents and royalties shall be determined without regard to the provisions of this paragraph. This paragraph shall have no application, in the case of coal, for the purposes of applying section 102 or subchapter A of chapter 2 (including the computation under section 117 (c) (1) of a tax in lieu of the tax imposed by section 500)."